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PP

v.

BAYATI HEIDER

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HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CRIMINAL TRIAL NO: 45A-24-2010]
2 JANUARY 2014

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Prima facie case - Whether established - Intrusive search - Retrieval of drugs from human excretion - Whether there was lack of documentary proof - Whether statutory requirements complied with - Inconsistencies of oral evidence - Whether casted doubt on identity of drugs*

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tendered in court - Infirmities found in prosecution's case - Whether accused discharged and acquitted - Criminal Procedure Code, s. 20A, Fourth Schedule ss. 13(1), (2) & 15

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The accused was detained at the Kuala Lumpur International Airport ('KLIA') by SP5 and his team. On a full body search and baggage check, nothing incriminating was found. However, the refusal by the accused to drink when invited by SP5 and his men aroused their suspicion. The suspicion was compounded by the fact that the accused had sat upright throughout the period he

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was in the examination room. An X-ray taken of the accused at the Serdang Hospital showed foreign objects in the intestine of the accused. The accused was then detained at ward 7C of the hospital, which was guarded by a total of three chief sentries on duty (SP1, SP3 and SP4) on a rotation basis. The duty of the

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chief sentry was to inform SP5 the moment the accused excreted any substance when passing motion. The accused had then excreted six times within a period of six days a total of 67 capsules. SP5 handed the packets containing the capsules to the investigating officer SP6 who then sent the capsules to the

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chemist, SP2. On analysis of the contents, SP2 confirmed the substance of the capsule was methamphetamine. The issues that arose were (i) whether there was lack of documentary proof; (ii) whether there was non-compliance with statutory provisions; (iii) whether there were inconsistencies of oral evidence and

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(iv) whether the prosecution established a *prima facie* case.

Held (discharging and acquitting the accused):

(1) The proof of the excretion and the number of capsules excreted by the accused depended entirely on the evidence of the three chief sentries and SP5. There was not a single photograph tendered which captured the excretion by the accused. Further, there was no search list prepared and signed by the officer seizing the items and counter signed by the accused for each excretion which was a normal practice in other cases. There was also no handing over list from the chief sentry to SP5 to signify the handing over of the items excreted. The preparation of a search list is a statutory requirement as stipulated under s. 20A of the Criminal Procedure Code ('the Code'). (paras 10 & 11)

(2) Any search of a person shall comply with the procedure on body search as specified in the Fourth Schedule of the Code. The relevant issue at hand where the drugs were retrieved by excretion from the accused falls under s. 13(1) of the Fourth Schedule which provides that an intrusive search means a search involving examination of a person arrested to determine the existence of any object inside the body or body orifices of the person etc. Another statutory requirement was s. 13(2) of the Fourth Schedule that the intrusive search shall only be conducted by a Government Medical Officer or Medical Officer. This statutory requirement had not been complied with. In this case, it was clear that only police officers were present during the excretion by the accused. (paras 12-15)

(3) The quality of evidence was dependent on the credibility of the witnesses. Evidence given by SP5 that he had no experience in dealing with a situation where the drugs were apparently swallowed by the accused and excreted showed that the enforcement was not fully conversant with the procedures to be applied and carried out their duties according to their own limited understanding. There were also marked contradictions between the evidence of the sentries and SP5 as to the markings found on the packets containing the excreted capsules. The final straw was that there was a marked discrepancy of the gross weight between the weight stated by SP5 as being weighed by the three sentries and the

A weight obtained by the chemist. Thus, the unsatisfactory nature of the oral evidence had cast a long shadow on the identity of the drugs tendered in court. (paras 18-22, 25 & 26)

B **(4)** The prosecution miserably failed to prove that the capsules excreted by the accused were the same capsules sampled by the chemist and finally produced in court. Taking into account the infirmities of the prosecution's case, the prosecution had failed to prove a *prima facie* case against the accused on the C charge against him. (para 20)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
D *Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC* ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 20A, 180(1), Fourth Schedule, ss. 13(1), (2), 15

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For the prosecution - Iswa Tonie, DPP
For the accused - Imran Hadzalie Abdul Hamid; M/s Elinda, Imran & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Akhtar Tahir J:

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The Charge

[1] The accused in this case was charged as follows:

> That you on 3 October 2009 till 6 October 2009 at the toilet in
> H Ward 7C, Hospital Serdang in the District of Sepang, in the state of Selangor, did traffic in a dangerous drugs, to wit 393 grammes of Methamphetamine; and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act.

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The Facts

[2] The evidence led by the prosecution showed that the accused together with two others were detained at KLIA by SP5 (ASP Ahmad Nor a/l Nai) and his team. On a full body search and baggage check nothing incriminating was found. However the refusal by the accused and the two other suspects to drink when invited by SP5 and his men aroused their suspicion. The suspicion was compounded by the fact that the accused and the other two suspects sat upright throughout the one hour they were in the examination room.

[3] This suspicion prompted SP5 to bring the accused to the Serdang Hospital to be X-rayed. The suspicion of SP5 was well founded when the X-ray taken showed foreign objects in the intestine of the accused. On the advice of the doctor the accused and the other two suspects were detained at ward 7C of the hospital.

[4] The ward was guarded by a chief sentry together with a few other sentries on a rotation basis. The duty of the chief sentry was to inform SP5 the moment the accused excreted any substance when passing motion. The accused in this case excreted 6 times within a period of three days a total of 67 capsules. A total of three chief sentries were on duty (SP1, SP3 and SP4) when the accused excreted the capsules.

[5] SP5 marked the six plastic bags and each of the capsules and kept them in his steel cabinet. After the final day of discharge by the accused and the two other suspects, SP5 handed all the packets containing the capsule to the investigating officer Insp Mohd Firdaus bin Ali (SP6).

[6] As part of his investigation SP6 sent all the capsules to the chemist Suhana bt Ismail (SP2) at the Chemistry Department Petaling Jaya. On analysis of the contents SP2 confirmed the substance in the capsule was dangerous drug methamphetamine to the weight of 393g.

Decision At The End Of The Prosecution's Case

Burden Of Proof

[7] It is incumbent upon the court at the end of the prosecution's case to evaluate the evidence led by the prosecution to determine whether the prosecution has proven a *prima facie* case. This is enjoined in the statutory provision contained in s. 180(1) of the Criminal Procedure Code which states that:

When The Case For The Prosecution Is Concluded, The Court Shall Consider Whether The Prosecution Has Made Out A Prima Facie Case Against The Accused

[8] The extent to which the court needs to evaluate the prosecution's evidence has been canvassed in various courts including the apex court many times. For my purpose I find the decision in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 illuminating where it is stated as follows:

> The close of the prosecution's case subject to the evidence led by the prosecution in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits two or more inferences, then draw the inference that is most favourable to the accused.

[9] What amounts to *'prima facie'* proof has been succinctly stated in the case of *Balachandran v. PP* [2005] 1 CLJ 85 as follows:

> ... The test at the close of the prosecution case would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no *prima facie* case.

Evaluation Of The Prosecution's Evidence

Lack Of Documentary Proof And Non Compliance With Statutory Provisions

[10] There were a number of factors in this case which I considered to determine whether the burden had been discharged. A stark reality which was apparent in this case was that the proof

of the excretion and the number of capsule excreted by the accused depended entirely on oral evidence of the three chief sentries and SP5.

[11] There was not a single photograph tendered which captured the excretion by the accused. Such photographs are tendered in the other similar cases I had tried. Further there was no search list prepared and signed by the officer seizing the items and counter signed by the accused for each excretion which again is a normal practice in other cases. Lastly there was no handing over list from the chief sentry to SP5 to signify the handing over of the items excreted.

[12] The preparation of a search list is a statutory requirement as stipulated under s. 20A of the Criminal Procedure Code which states as follows:

(1) Any search of a person shall comply with the procedure on body search as specified in the Fourth Schedule of this code.

(2) Notwithstanding any written law, the provisions of the Fourth Schedule shall apply to any search of a person conducted by any officer of any enforcement agency conferred with the power of arrest or search of a person under any law.

[13] The Fourth Schedule on the relevant issue at hand where the drugs were retrieved by excretion from the accused falls under s. 13(1) of the Fourth Schedule under the caption "Intrusive search" which provides as follows:

> An intrusive search means a search involving the examination of a person arrested to determine the existence of any object, evidence, weapon or contraband inside the body or body orifices of the person and includes the removal of such object, evidence, weapon or contraband.

[14] Section 15, under the caption "Procedure on intrusive search" provides *inter alia*, as follows:

> a list of all things seized in the course of the search shall be prepared by the officer conducting the search and signed by the person arrested and he shall be given a copy thereof.

[15] Another statutory requirement not complied with in this case is as mentioned in s. 13(2) of the Fourth Schedule that;

> The intrusive search shall only be conducted by a Government Medical Officer or a Medical Officer, or by any hospital assistant or a registered nurse acting under the Government Medical Officer or a Medical Officer's discretion.

[16] In this case it is clear only police officers were present during the excretion by the accused.

Inconsistency Of Oral Evidence

[17] In my mind despite the absence of documentary proof and failure to comply with statutory requirements the court is not barred from evaluating the oral evidence of the witnesses to determine whether a *prima facie* case has been proven. The court is at liberty to accept and believe the oral evidence of the police witnesses but because of absence of documentary proof and non-compliance of statutory requirements the oral evidence to be accepted and considered must be consistent, unblemished and of high quality.

[18] In this case the quality of evidence was dependent on the credibility of the witnesses. Here I approached the credibility of the witnesses by first considering the admission of SP5 that he had no experience in dealing with a situation as in the present case where the drugs were apparently swallowed by the accused and excreted. This held true for the three sentries as well. This evidence showed that the enforcement was not fully conversant with the procedures to be applied and carried out their duties according to their own limited understanding.

[19] Next I considered credibility by observing the demeanour of the witnesses. From my observation I noticed that the sentries as well as SP5 were hesitant in their answers and displayed instances of slipping of mind and pure forgetfulness. SP3 especially displayed a total lack of understanding of the questions asked and gave vague and incredulous answers prompting me at one stage to reprimand him.

[20] The credibility of the three sentries was further tarnished by intentionally ignoring the direction given by SP5 to record the name of the accused and time of excretion in their pocket diary. None of them mentioned that they had recorded the excretion by

the accused in their pocket diary. The other directive was to weigh the excreted capsules. Again there was no evidence from the three sentries that they had weighed the excreted capsules. SP5 on the other hand insisted that the three sentries had weighed the drugs.

[21] A marked contradiction between the evidence of the sentries and SP5 was as to the markings found on the packets containing the excreted capsule. All three sentries were certain that they had not marked the packets after placing the capsules in the plastic provided by the Hospital. SP5 on the other hand claimed that all the packets he received had the name of the accused and the time of excretion. SP5 first said that these markings were made by the chief sentry but later corrected himself to say the markings were made by the other sentries on duty but he could not determine whom.

[22] SP5 himself gave contradictory evidence on the marking when he first said he had written the accused name and the time of excretion he later changed his testimony by saying that he had written the time of excretion the date and initialled the packet. Later he added that he had put in the alphabets 'A' to 'F'.

[23] The unsatisfactory part of the marking by SP5 was that he chose to mark some of the capsules in the hospital in front of the sentry and the accused but other capsules he chose to mark on his own in his office. No one could verify this marking in his office as he was alone.

[24] The final straw was that there was a marked discrepancy of the gross weight between the weight stated by SP5 as being weighed by the three sentries and the weight obtained by the chemist. No explanation was forthcoming for this discrepancy.

[25] I took into account what was stated in the case of *PP v. Mohd Bandar Shaha Nordin & Anor* [2008] 4 CLJ 859 that:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross examination then it becomes the business of the magistrate to decide whether or not it should be accepted.

[26] In this case the unsatisfactory nature of the oral evidence has cast a long shadow on the identity of the drugs tendered in court. The importance of the identity of the drugs tendered as evidence in court in a drug trafficking trial cannot be underestimated. This has been emphasised in many authorities. I will just refer to one, the Supreme Court case of *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386; [1987] 1 MLJ 220.

[27] In this case the issue was on non-calling of a material witness but the principle applies as well as to situations to where witnesses are called but cannot explain discrepancies especially on the marking of exhibits. It was stated as follows:

> A very vital link in the prosecution case seems to be missing, The point was, in our view, rightly taken by counsel for both appellants when they contended that there was a serious break in the chain of evidence affecting proof as to identity of the exhibits. It is a question of proof whether in fact the exhibits produced were the exhibits that were seized, handed over to Supt Lum and returned by him to Supt Low and the kept by the latter under lock and key until they were produced in Court.

[29] Further on the court said as follows:

> … But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case

[29] Finally the court stated thus:

> The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of section 60(1) of the Courts of Judicature Act 1964, would amount to a relaxation of the law of criminal procedure to such an extent as to deprive the accused person of his right. In this regard it behoves us to reiterate that "the requirement of of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of the accused, its decision must be based on the evidence adduced and nothing else …

[30] In this case it is my view that the prosecution had miserably failed to prove that the capsule excreted by the accused were the same capsules sampled by the chemist and finally produced in court.

Decision At The End Of The Prosecution's Case

[31] Taking into account the infirmities of the prosecution's case I decided that the prosecution had failed to prove a *prima facie* case against the accused on the charge against him. I therefore discharged and acquitted the accused on the charge against him.